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REPORT OF

THE

SELECT COMMITTEE ON INTELLIGENCE

SUBCOMMITTEE ON SECRECY AND DISCLOSURE

NATIONAL SECURITY SECRETS: THEIR PROPER PLACE IN THE LAW

August 11, 1978

RS 3 2607

TABLE OF CONTENTS

I. PREFACE

> The President learned of the new horror. Bletchley (the site in England where British intelligence was decoding German military communications) was discovering ahead of time which civilian targets Hitler planned to strike next. Churchill and his War Cabinet had to decide which was more important: to warn the families marked for punishment or protect the secrets of Bletchley's growing apparatus for divining Nazi intentions.
> A Man Called Intrepid by William Stevenson.

The secrecy necessary for effective intelligence activities often forces upon government officials difficult moral dilemmas. A Man Called Intrepid is the story of the secret extralegal British and American intelligence apparatus established by Churchill and Roosevelt to combat the German war machine. The book is rife with anecdotes about difficult decisions by the President and the Prime Minister involving the need to protect the ULTRA secret (the fact that the allies had cracked the German code). Certainly the most famous of these was the foreknowledge allegedly provided Churchill through ULTRA of the German plans to firebomb Coventry.

According to Stevenson, Churchill decided not to evacuate Coventry out of fear that the Germans would realize the British had broken their code.* When confronted with Churchill's decision on Coventry and similar questions, Roosevelt is said to have remarked, "War is forcing us more and more to play God."

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* Critics of Stevenson's book contend that this anecdote is inaccurate. Nonetheless, there is little doubt that Churchill had to face many agonizing decisions in which he decided not to forewarn citizens for fear of jeopardizing the ULTRA secret.

Since World War II, intelligence activities and concomitant secrecy have increased rather than subsided. The moral dilemmas have increased. Certainly most officials of British and American intelligence would agree with Sir William Stephenson, the man code-named "Intrepid":

> We live in a world of undeclared hostilities in which such weapons (the weapons of secrecy) are constantly used against us and could, unless countered, leave us unprepared again, this time for an onslaught of magnitude that staggers the imagination.

Stephenson concludes his discussion of the need for secrecy with the following insight:

> So there is the conundrum: how can we wield the weapons of secrecy without damage to ourselves? How can we preserve secrecy without endangering constitutional law and individual guarantees of freedom?

Stephenson expresses the conventional concern that secrecy could undermine democratic principles, and no one who has lived through the past few years can deny the price that we have sometimes paid for secrecy in intelligence and government. However, in the course of our study of secrecy we found that there is a part of the present-day dilemma which Stephenson does not mention. Indeed it is not unlike the problem of foreknowledge faced by Churchill and Roosevelt in "Coventry-type" situations. Secrecy and a desire on the part of the intelligence community to preserve secrets has at times, posed certain threats to the national security itself. This report demonstrates the fact that the more sensitive the information compromised, the more difficult it becomes to enforce the laws that guard our national secrets. This occurs principally because the legal

steps necessary to pursue a breach entail, almost inevitably, some further compromise of sensitive material. This is not a problem which is likely to be corrected by a revision of our substantive espionage statutes.

This impasse may not only adversely affect national security but also threatens the administration of justice. Intelligence agencies through the last several decades have, in the name of "protecting sources and methods", attempted to hold themselves apart from the rest of the Executive branch and the Congress. This phenomenon fostered the belief among some intelligence officials that they were subject to a different standard of law. Certainly secrecy and that estrangement were important causes of recent crises concerning the intelligence agencies.

Therefore, the real dimensions of the problem that the staff has discovered are broader than the conundrum posed by Stephenson. The basic dilemma facing the intelligence community, the Executive branch and this Committee is not just whether secrecy and democracy are compatible, but whether maintaining secrecy at any cost can undermine the national security, the enforcement of the espionage statutes, and the general administration of justice. In the words of one Justice Department official who testified before the Subcommittee, "To what extent must we harm the national security in order to protect the national security?"

Joseph R. Biden, Jr., Chairman
James Pearson, Vice Chairman
Subcommittee on Secrecy
and Disclosure

Next 2 Page(s) In Document Exempt

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III. BACKGROUND OF SECRECY AND DISCLOSURE SUBCOMMITTEE INQUIRY

On April 26, 1977, the Subcommittee asked the staff to undertake (1) a review of unauthorized disclosures of intelligence information and (2) an inquiry into the use of compartmentation -- a procedure to place special limitations on access to information that is especially sensitive. Although some progress has been made on the second inquiry, most of the Subcommittee's work has concentrated on the first question which will serve as the focus of this report.

The Subcommittee conducted its inquiry through both interviews and file searches at the intelligence agencies. We have conducted over thirty interviews and briefings with officials of the Departments of Justice and State and the major intelligence agencies (CIA, NSA and DIA). In the course of these briefings we asked each agency to provide us with ten cases in which intelligence information had been covertly passed to foreign powers -- classical espionage cases -- or in which intelligence found its way into the public media -- intentional or accidental leak cases. We have reviewed over forty case files or summaries of case files provided by these agencies. These files have served as a valuable data base for our survey. Indeed, we believe that they represent the most comprehensive compilation of such information in either the Executive branch or Congress. Each file contains information on an intelligence compromise which has occurred in the last few years [redacted] STAT

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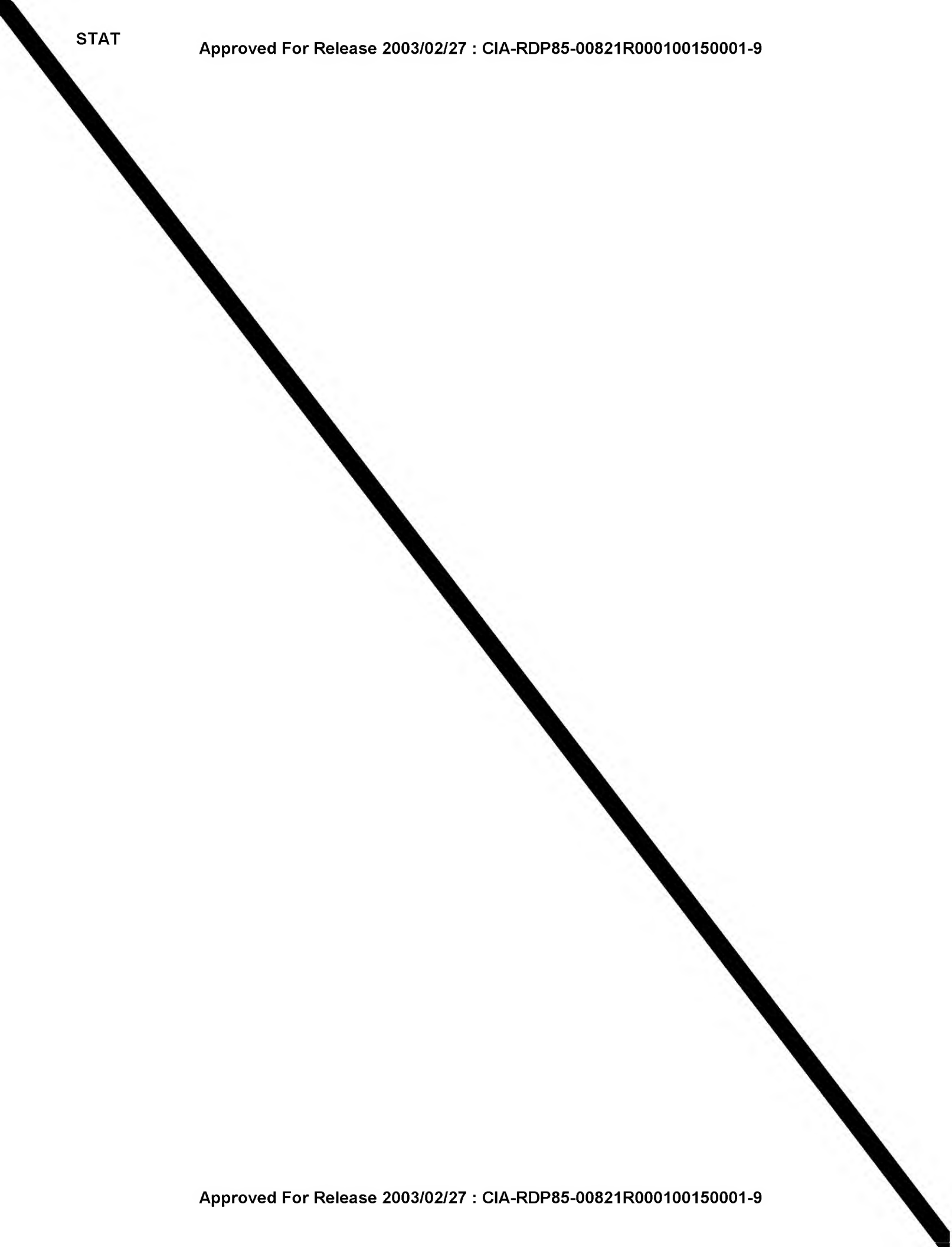

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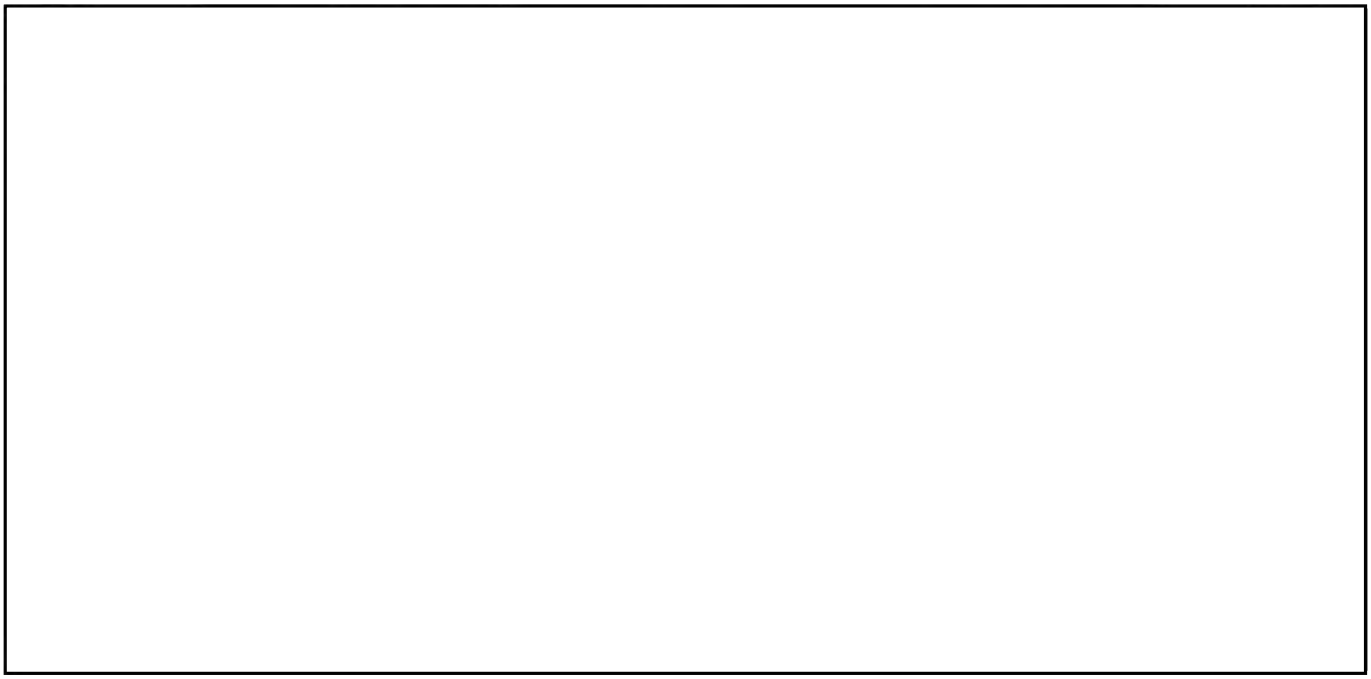

On March 1st, 2nd and 6th, the Subcommittee on Secrecy and Disclosure conducted public hearings on the matters raised by our inquiry. The Subcommittee heard from Admiral Stansfield Turner, the Director of Central Intelligence; Benjamin Civiletti, the Acting Deputy Attorney General; Philip Lacovara, formerly of the Watergate Special Prosecutor's Office; Judge Fletcher, Chief Judge of the Court of Military Appeals; William Colby, former Director of Central Intelligence; Lawrence Houston, former CIA General Counsel; and Morton Halperin, representing the American Civil Liberties Union. The purpose of this report is to summarize the Committee's findings based on these hearings and its year-long inquiry, and to report its recommendations for

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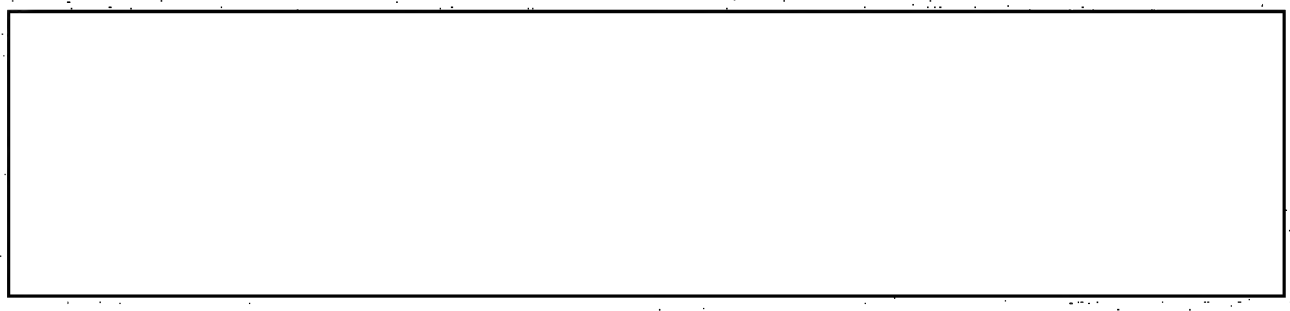

legislative and administrative actions to facilitate administration of certain statutes related to the national security.

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Approved For Release 2003/02/27 : CIA-RDP85-00821R000100150001-9

United States v. Moore was the successful prosecution last year of a former CIA official who tossed classified documents

onto the Russian Embassy lawn here in Washington. United States v. Boyce and Lee, also successfully prosecuted last year, involves an employee of TRW, a large defense contractor in California, who passed photographs of documents describing extremely sensitive intelligence systems to the Russians. Both cases were the subject of considerable tension between the CIA and the Department of Justice. Both required protracted negotiations on whether to use individual documents and witnesses in the trial. In one case friction over those sorts of issues became so intense that the lawyer assigned responsibility in CIA's Office of General Counsel refused to participate any further. In the Moore case disagreements between DCI George Bush and Attorney General Levi almost required President Ford's intervention on his last day in office.

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Next 15 Page(s) In Document Exempt

Approved For Release 2003/02/27 : CIA-RDP85-00821R000100150001-9

VI. PAST LEGISLATIVE AND ADMINISTRATIVE PROPOSALS IN RESPONSE TO THE "GRAY MAIL" PHENOMENA

Over the years the CIA and its predecessors have responded with two initiatives to the problems of enforcement of the espionage and other statutes which risk disclosures of foreign intelligence "sources and methods". First, especially with respect to leaks and espionage violations, military and intelligence agencies have called for enactment of statutes similar to the British Official Secrets Act. Second, since 1954 the CIA has sought special arrangements with the Department of Justice designed to avoid controversies in these kinds of cases by relieving CIA of its responsibility to report to the Department criminal activity where further investigation might, in CIA's judgment, jeopardize clandestine operations.

A. Legislative Initiatives: Abortive Efforts to Enact An Official Secrets Act

Obviously, some of the problems described earlier in the administration of espionage statutes would be resolved if the culpability requirements were eased. It would be immensely easier to prosecute leaks and espionage if all that had to be proven was that the defendant had passed classified information to unauthorized persons -- essentially the rule under the Official Secrets Act.*

According to Professor Benno Schmitt of Columbia Law School, one of the nation's experts on our espionage statutes, proponents

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* It should be noted that the Official Secrets Act not only applies to divulgence but also to publication of secrets, and that its scope extends to all official government information, not just national security secrets.

of such legislation "reached back to Civil War experience, in which the Union cause had been hindered by newspaper detailing of military plans prior to their execution." The most famous confrontation in the Congress over this kind of legislation was during the Wilson administration when, according to Professor Schmitt, the administration "proposed to censor or make punishable after the fact (exactly which option was never made clear), publication of defense information in violation of Presidential regulations, without any limiting culpability requirement." According to Schmitt:

> In response to this proposal, the Congress engaged in its most extensive debate over freedom of speech in the press since the Alien and Sedition Acts. The preoccupation was not an academic one. Opponents feared that President Wilson or his subordinates would impede, or even suppress, informed criticism of his administration's war effort and foreign policy under the guise of protecting military secrets...The aggrandizing of presidential powers during wartime was a recurrent fear of Republicans, especially Senate progressives such as Borah, LaFollette, Norris and Hiram Johnson.

The proposal was ultimately voted down and only the more modest of the Wilson administration's espionage proposals were adopted. That legislation serves as the framework for our present espionage statutes.

Similar proposals were made during the World War II period. In 1946 the Joint Congressional Committee for Investigation of the attack on Pearl Harbor recommended that Congress enact legislation prohibiting the revelation of any classified information. During the war there had also been a study jointly conducted by Army and Navy Intelligence and the FBI which made

similar recommendations transmitted by the Secretary of War to the Attorney General in June, 1946.

In 1947, the predecessor of Section 798, making it a crime per se to reveal communications intelligence, was introduced and in September of 1948 an omnibus bill was proposed by the Truman administration incorporating the Section 798 language and a number of earlier proposals for simplifying the culpability requirements of the espionage statutes. During this period the CIA, objecting to what it called a "piecemeal" approach of amending various sections of the espionage statutes to deal with special limited problems, suggested a redrafting of the whole espionage statute along the lines of the British Official Secrets Act. A few of the technical changes proposed by the Truman administration, and the intelligence and the military departments were incorporated into Title 18; the most significant of those was Section 798 of Title 18. However, the intelligence community and Department of Defense were not satisfied with those amendments and in 1952 Defense Secretary Robert Lovett proposed to President Truman that the administration still seek legislation similar to the British Official Secrets Act. The Justice Department prepared such legislation but it did not reach the floor in either House.

In 1957 the Commission on Governmental Security suggested legislation that would make it a crime "for any person willfully to disclose without proper authorization for any purpose whatsoever, information classified, knowing such information to have been so classified." The Commission justified its proposal in terms of the "gray mail" problem:

> Since espionage cases may frequently involve national security information of the highest classification, the government is confronted with a serious problem of how far such information can be compromised in the course of prosecution...A defendant who may have met with the greatest success in securing our most precious secrets, may also have secured an advantage in warding off successful prosecution.

No action was taken on the Commission's recommendation, nor on subsequent initiatives in 1958 in the Eisenhower administration, nor a similar initiative in 1966 by the CIA. Indeed, legislation was never seriously considered in this area until the Federal Criminal Code Reform legislation was introduced by the Nixon administration. That legislation contained some of the recommendations suggested by the intelligence community in the past but met with strenuous opposition from media and civil liberties groups. Similarly, those same groups strongly criticized legislation drafted by the CIA and proposed by the Ford administration in February of 1976. No action has been taken on the CIA proposal.

Typical of the type of opposition that the Federal Criminal Code Reform and the subsequent Ford administration proposal provoked is the testimony of Jack Landau of the Reporters Committee for Freedom of the Press before a Congressional subcommittee which was considering the Federal Criminal Code Reform:

> It is abundantly clear that S. 1 (the Code reform proposal) is an unwise and unconstitutional proposal which could be used to silence the type of aggressive news reporting which produced articles about the Pentagon Papers, the Mylai massacre, the Watergate cover-up, the CIA domestic spying, the FBI domestic spying and other government misdeeds: News reporting which has been embarrassing to some persons in the government and which is dependent in whole or

in part on government compiled information and reports frequently supplied to the press by present or former government employees without government authorization.

The new espionage provisions of the Federal Criminal Code Reform were dropped prior to its consideration by the Senate early this year; proponents realized that any further action on the Federal Criminal Code Reform would be indefinitely postponed as long as there was significant controversy over its constitutionality.

B. Administrative Initiatives

In February of 1954 Lawrence Houston, General Counsel for the CIA, established an arrangement with William Rogers, Deputy Attorney General, to obviate the need to report to the Department of Justice certain criminal activity coming to CIA's attention.

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The ambiguity of the arrangement is highlighted by an exchange of correspondence between the CIA and the Bureau of the

Budget in August of 1954. The CIA expressed concern regarding legislation about to be enacted which would grant the Attorney General exclusive responsibility for investigating all violations of Title 18 by government officers and employees. Notwithstanding the CIA's concerns, that legislation was eventually enacted and codified as 5 U.S.C. S.311(a) (since recodified in 28 U.S.C. S.535(b)(2), see Appendix).

In November of 1958, Rogers sent a memorandum to the heads of all departments and agencies in the Executive branch of government emphasizing their responsibilities under the legislation. Subsequent Attorneys General have issued the same reminder soon after taking office. However, for over twenty years the CIA, based on its 1954 arrangement, assumed these directives exempted reporting the kinds of cases Houston had described to Rogers. Although there were minor changes in the procedures described in Houston's original memorandum -- in 1955 and again in 1964 -- the basic thrust of the arrangement wherein CIA took primary responsibility for balancing the need for secrecy against the administration of justice remained until 1975.

In January of 1975 DCI William Colby and Lawrence Silberman, Acting Attorney General, reviewed the 1954 arrangement. At that time Silberman took the position that the agency should comply with 5 U.S.C. S.311(a) by providing a summary "but not an investigative report as such" in essentially every case and that the basic security issue should be raised, but that the Attorney General, not the CIA, would make the decision on whether or not to prosecute. The responsibility of the CIA to report evidence

of crimes by its employees to the Attorney General was the subject of a specific provision in Executive Order 11905 issued by President Ford (designed to regulate the activities of the intelligence community) and its successor issued by President Carter, Executive Order 12036.

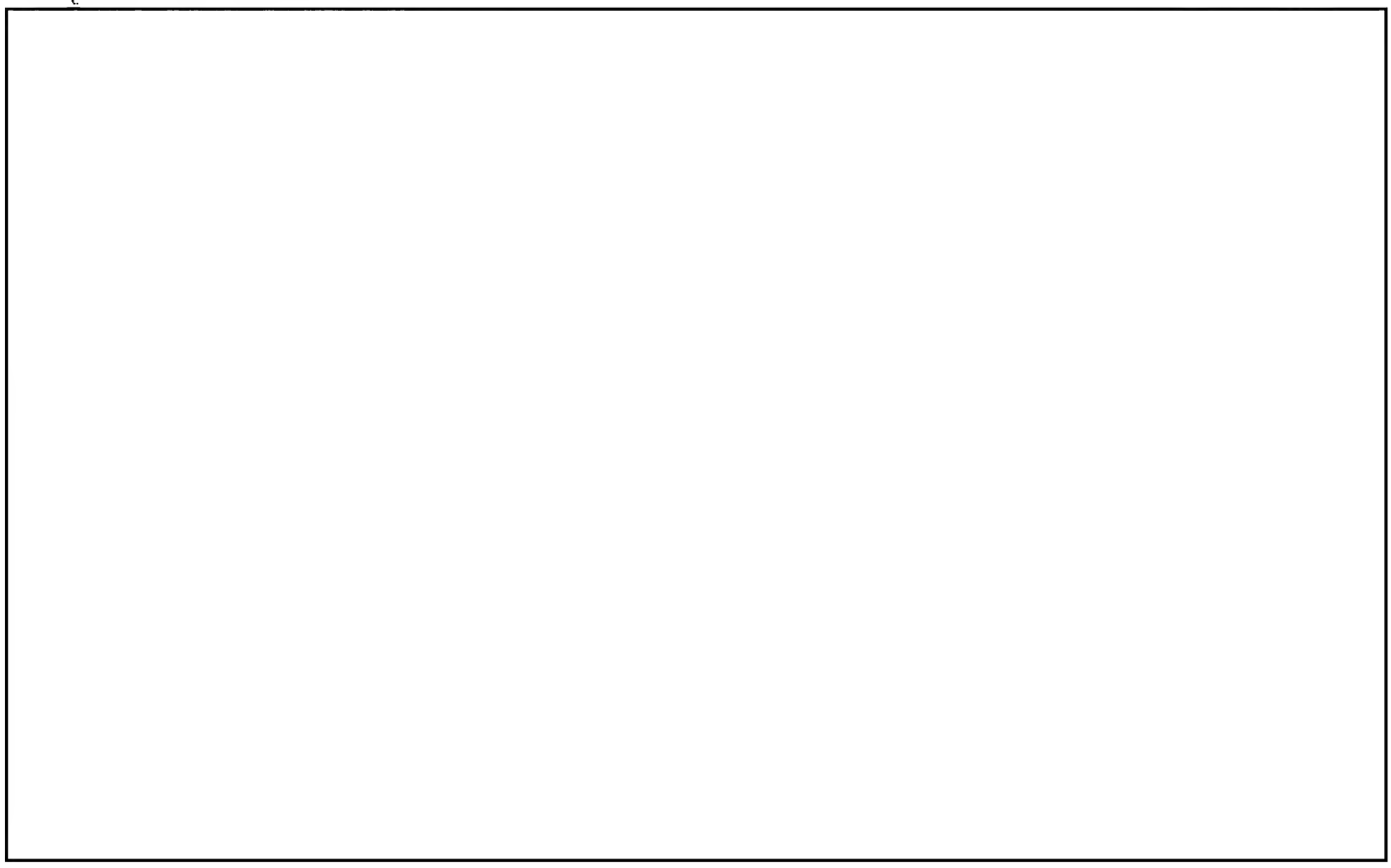
The Attorney General and DCI are currently attempting to develop a memorandum of understanding which would serve as a successor to the 1954 arrangement. The new Executive Order and the draft memorandum of understanding between Justice and CIA retain the principle established by acting Attorney General Silberman that the Department of Justice has the responsibility of balancing the needs of secrecy against the ends of justice.

Both the memorandum of understanding and the Executive Order purport to impose a burden on the intelligence community to report criminal acts by its own employees. With respect to non-employees, the new Executive Order reads as follows:

> ...(the head of any intelligence agency must) report to the Attorney General evidence of possible violations by any other person of those federal criminal laws specified in guidelines adopted by the Attorney General.

No such guidelines have yet been adopted and, therefore, the reporting requirements under that provision are unclear. Furthermore, neither the memorandum of understanding nor the Executive Order address the way in which the Department of Justice should handle evidence necessary to investigate or prosecute an allegation brought to its attention under these provisions. In other words, neither the memorandum of understanding nor the Executive Order are intended to resolve the controversies on the use of classified information in the

prosecution or investigation of crimes, the problem to which this report is addressed. STAT



VII. NEW INITIATIVES

The Committee agrees with former DCI Colby's testimony before the Subcommittee on Secrecy and Disclosure that, "We would be irresponsible if our revision of intelligence structure did not recognize the need to protect the necessary secrets of intelligence better than we do today." A resolution of the dilemma presented by this report must be a part of the charter legislation being considered by the Intelligence Committee.

To meet the problems set out in this report, the Committee has prepared a recommended program.* This program is designed to serve two basic ends: first, to facilitate the enforcement of espionage statutes and thereby protect our national secrets without jeopardizing constitutional principles; and second, to facilitate enforcement of the criminal sanctions set out in the legislative charters.

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* The Committee's recommended program is contained in seven recommendations found in Part VIII, infra.

Next 3 Page(s) In Document Exempt

Approved For Release 2003/02/27 : CIA-RDP85-00821R000100150001-9

B. Facilitating Enforcement of Existing Statutes and the Charters

The review of the cases described earlier and the hearings of the Secrecy and Disclosure Subcommittee have led the Committee to recommend a program of both administrative and legislative action designed to facilitate enforcement of the espionage statutes. In essence, on the administrative side, the Committee recommends a streamlining of decisionmaking within the Executive branch on cases where leaks or espionage occur and to encourage the use of administrative sanctions in less serious breaches of security or other violations of the law. On the legislative side, the Committee recommends a variety of new judicial procedures intended to strengthen the hand of the judge and encourage accommodation between the defendant and the prosecutor concerning the use of classified information in litigation -- to seek solutions which encourage proceeding with prosecution rather than dropping the case out of fear of disclosure of sensitive information.

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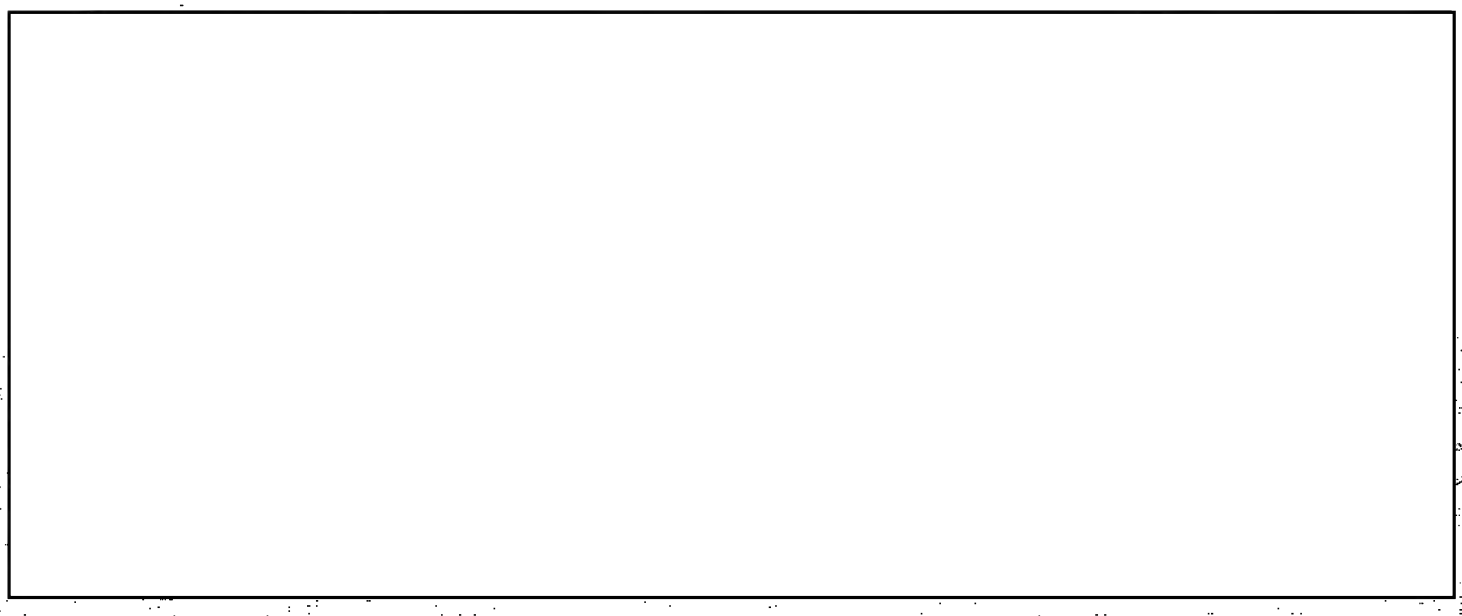

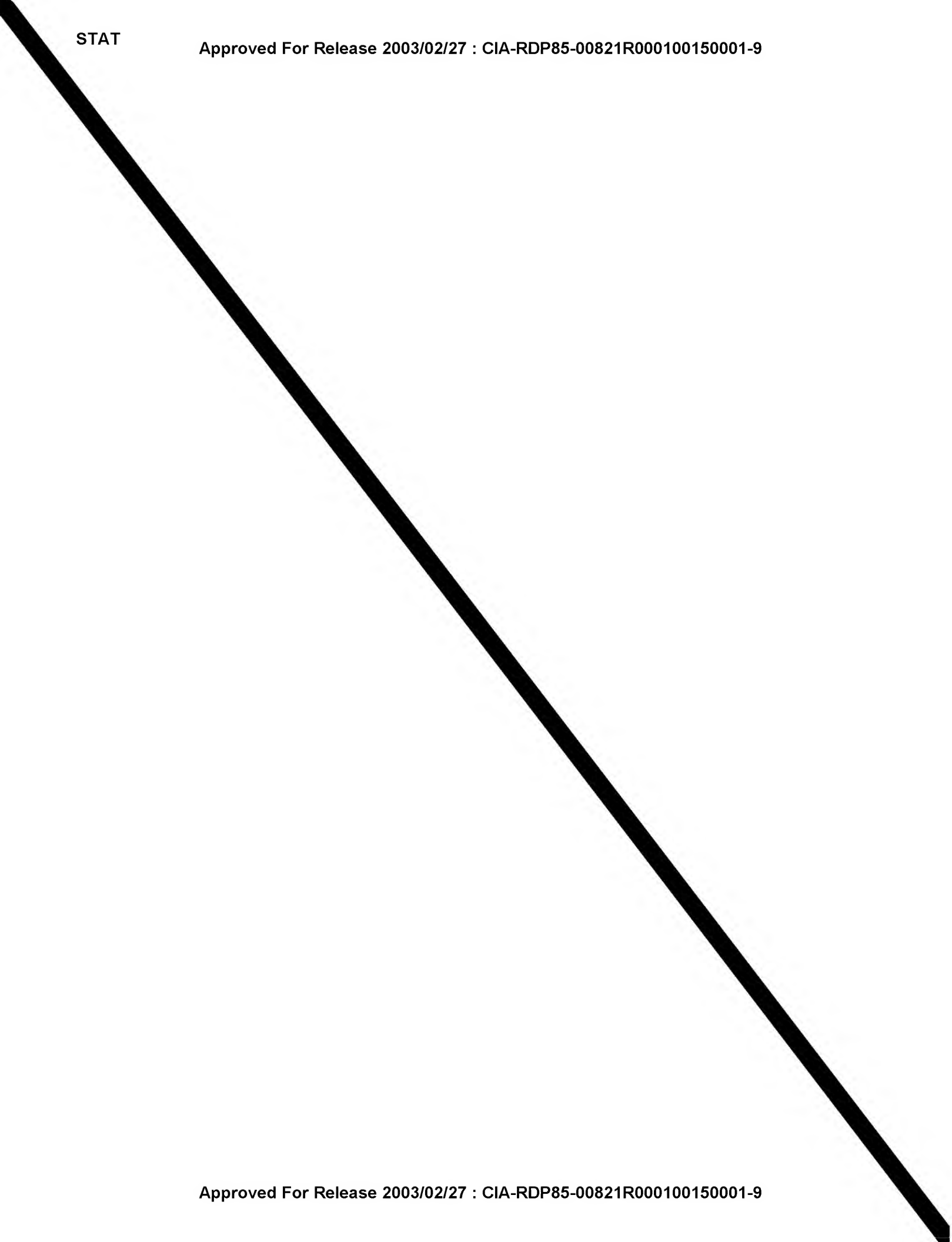

Approved For Release 2003/02/27 : CIA-RDP85-00821R000100150001-9

These standards do not go as far as the recommendations of the Rockefeller Commission (on alleged CIA abuses), which proposed FBI investigations without evidence of a crime or the Attorney General's approval. Nevertheless, they break sharply with current Justice Department policy foreclosing FBI investigations of damaging criminal leaks where administrative action, rather than prosecution, is the intended result.

The Justice Department is properly concerned that such cases waste time and money because they often turn out to be leaks either formally or informally sanctioned by appropriate authorities. Nevertheless, where such a leak endangers sensitive sources or methods and violates the criminal statutes investigation is appropriate. The higher the criminal leaker, the more important it is to bring in the FBI and the Attorney General, regardless of the inability to prosecute.

The Director of Central Intelligence has extraordinary powers under the 1947 National Security Act, and will have similar authority under the new legislative charters, to dismiss CIA employees. With that authority comes the implied responsibility to investigate employees' past activities which would warrant dismissal. This investigative authority should not be delegated to the FBI except in the case of explicit criminal violations. Some organization with intelligence community-wide authority should be required to investigate activity by intelligence agents, employees or informants which violates security or charter prohibitions.

As stated, the advantage of administrative sanctions over criminal prosecution is that procedures under the former do not

require extensive public disclosure of classified information. Therefore, both the staff of the Committee and representatives of the Executive branch should explore what possibilities exist for formalizing and upgrading administrative review and investigation procedures for violations of security and other unlawful acts by intelligence officials. For example, a possible alternative is an administrative review procedure for employees similar to courts martial in the military. Officials of the agency would hear complaints of violations, especially in circumstances where the decision has been made to forego criminal proceedings for national security reasons. These administrative review procedures could be applied to former employees who violate charter prohibitions, assuming that a deferred compensation pension plan has been conditioned upon continued compliance with security and charter requirements. Former employees who violate prohibitions could be subject to loss of pension rights through the administrative procedure, although this procedure would raise constitutional "due process" issues.

Another major goal of the Committee recommendations for administrative action is to improve accountability in Executive branch decisionmaking concerning cases involving national secrets. The Committee agrees with the testimony of Philip Lacovara before the Secrecy and Disclosure Subcommittee:

> I have the sense that the government may be aborting cases prematurely or unecessarily because of a failure to press the alternatives to their fullest, as we did, for example, in the Special Prosecutor's Office in the Ellsberg break-in prosecution, where defense efforts to use "national security threats" to stymie the case were beaten in the courts.

During the course of the hearings the Subcommittee members and witnesses agreed on a number of fundamental points about decisionmaking in these cases. There is little controversy that the ultimate decision on whether to proceed on these types of cases must be centralized within the Attorney General's office. The DCI should have shared authority with the Attorney General through the "sources and methods" provision of the National Security Act to halt investigation of a criminal case. The Deputy Attorney General and the DCI in testimony before the Subcommittee agreed that it was up to the Attorney General, with disputes settled by the President, to decide whether or not the jeopardy to national secrets in pursuit of an investigation outweighs the ends of justice.

If the intelligence community disagrees with an Attorney General's decision, the DCI may appeal to the President. The decision to drop a national security case should be made in writing by a high-level official within the Department of Justice, an Assistant Attorney General or a Deputy Assistant Attorney General. Included in that written decision should be a detailed explanation of the information which would have been revealed in the course of trial, why the information would be revealed, and what damage the disclosure of the information would have to the national security. The mere fact that a written record must be made will discourage thoughtlessly dropping a potential prosecution.

A final area appropriate for administrative action pertains to the requirement that intelligence agencies report to the Department of Justice evidence of criminal activity by employees.

As noted in Part VI of this report, the administration is currently at work attempting to implement provisions of the new Executive Order and to update the so-called Silberman-Colby understanding as to the requirements of the intelligence community to report crimes of its employees to the Department of Justice. If there is no mechanism through which the Department of Justice is so notified, the law enforcement process is likely to break down.

Thus the so-called Silberman-Colby understanding should be updated and formalized. It is equally important that the memorandum of understanding be expanded in scope to address not only criminal activities of intelligence agents, employees or assets, but also criminal activity known by the intelligence community which does not involve its employees or assets. Such an understanding must consider the protection of sources or methods.

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Next 3 Page(s) In Document Exempt

Approved For Release 2003/02/27 : CIA-RDP85-00821R000100150001-9

VIII. RECOMMENDATIONS

The recommendations which follow were formulated by the Secrecy and Disclosure Subcommittee and are endorsed by the full Committee. They will serve as an agenda for the Committee as it proceeds with consideration of legislative charters. The staff will be developing specific legislative proposals to implement these recommendations for inclusion in the charters to be discussed in the course of its ongoing hearings. It is the Committee's hope that the Executive branch will work with the Committee on these matters and, in particular, on its recommendations for administrative action.

I. The Congress should not at this time consider any general recasting of the federal espionage statutes along the lines of the British Official Secrets Act. Limited further protection of sources and methods, especially human sources, may be required, however. Congressional energies would be better spent on developing procedures to facilitate enforcement of existing statutes.*

II. The Executive branch should interpret the new Executive Order on security classification with an emphasis on decreasing the amount of unnecessary secrecy. The intelligence community, the Intelligence Oversight Board, and the intelligence committees of the Congress should declassify as many as possible of their reports and studies on matters of public concern to discourage the "leaking" of versions which have not been sanitized to protect "sources and methods" information. These reports and studies must be declassified in a disinterested manner, so that the public receives the true view of a given situation.

III. The intelligence community should develop, in conjunction with the Committee, administrative review procedures for the exercise of the DCI's authority for the dismissal of employees for violations of security

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* For discussion of the Committee's rationale for recommendations I and II, see pps. , supra.

or other provisions of the intelligence community charter. At the same time the intelligence community should centralize authority, perhaps in the Intelligence Oversight Board, for investigations of breaches of security and violations of charter prohibitions which do not constitute crimes. The purpose of these procedures would be to permit sanctions against employees who violate the charter through procedures similar to a military court martial where it is easier to cope with classified documents or testimony than in traditional public criminal trials. Some consideration should also be given to applying these administrative review procedures to former employees through withdrawal of pension rights for former employees who violate security or provisions of the charter.*

IV. The FBI should continue to have exclusive responsibility for investigating criminal violations involving the intelligence community. In leak cases the FBI should initiate investigation if:

(1) the leak endangers sensitive intelligence sources or methods and is reasonably believed to violate the criminal statutes of the United States;

(2) the persons investigated are Government officials having access to the information leaked;

(3) the investigation and any intrusive investigative techniques are authorized in writing by the Attorney General;

(4) the investigation terminates within 90 days, unless such authorization is renewed; and

(5) the Attorney General submits information concerning the leak to the head of the employing agency, or to the President, for appropriate administrative action.

V. The Attorney General should issue regulations that are binding upon all departments of the government which set out the procedures whereby agencies of the intelligence community are to report crimes that come to their attention and to provide necessary information to attorneys of the Department of Justice to proceed with a criminal investigation or prosecution.

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* For discussion of the Committee's rationale for recommendations III, IV, V, and VI, see pps. , supra.

The regulations should also set out how the decision is to be made not to proceed in national security cases and who is authorized to make such a decision. These regulations should require that any such decision be made in writing and the decision paper should include the precise intelligence information which would have been disclosed in the course of the trial, why the official believes it would have been disclosed, and the damage the information would have to the national security if the case proceeds. The decision paper should be available to the intelligence oversight committees of the Congress and such cases should be reported to the committee annually or as required.

VI. The Executive branch should complete its memorandum of understanding between the Attorney General and the DCI on the responsibility of the intelligence community to report crimes to the Department of Justice. The memorandum of understanding should be expanded to cover reporting of all activity in violation of U.S. laws coming to the attention of the intelligence community, but must consider protection of sensitive sources and methods.

VII. Congress should consider the enactment of a special omnibus pre-trial proceeding to be used in cases where national secrets are likely to arise in the course of a criminal prosecution. The omnibus procedure would require the defendant to put the prosecution and the court on notice of all motions or defenses or arguments he intended to make which would require the discovery and disclosure of intelligence information or the use of intelligence community witnesses. The judge would be required to rule in advance of the trial on the admissibility of the intelligence information and on the scope of witnesses' testimony as well as the general relevancy of the motion or defense prior to granting discovery of any intelligence information to the defendant. On the other hand, the defendant would be permitted a discovery motion during the course of trial if the prosecution presents a matter not originally suggested by indictment or for which the defendant could not fairly have been expected to be on notice at the time of the omnibus procedure.*

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* For a discussion of the Committee's rationale for recommendations VII and VIII, see pp. f.f., supra.

VIII. The Congress should reconsider the secret of state privilege proposed by the Supreme Court in 1974. That privilege needs to be considerably revised along the lines described above but at a minimum should provide for an in camera adversary procedure on the privilege, define the scope of the privilege, the standards for its invocation, provide increased judicial authority for its procedural administration, and provide a sliding scale of sanctions available to the judge in the case where the privilege is successfully invoked.

Next 1 Page(s) In Document Exempt

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